

*a***PUBLIC PROSECUTOR****v.****CHIONG PHING LUNG***b*

HIGH COURT SABAH & SARAWAK, SIBU  
TEE AH SING J  
[CRIMINAL APPEAL NO: 20-41-11 OF 1997]  
16 JUNE 1998

*c*

**CRIMINAL LAW:** *Common Gaming Houses Act 1953, s. 4A - Whether accused was in possession of incriminating exhibits - Whether exhibits amounted to lottery tickets*

*d*

This was an appeal by the Public Prosecutor against the decision of the magistrate whereby the respondent who was charged under the Common Gaming Houses Act 1953, s. 4A(a), was acquitted and discharged.

*e*

The issues for consideration were: (i) whether the respondent was in possession of the incriminating exhibits P2, P4(a) and P4(b); and (ii) whether exhibit P2 were copies of lottery tickets or record stakes relating to any lottery.

The prosecution argued that the respondent in her caution statement did not deny that she knew of the exhibits while the defence submitted that there was no evidence to show that the exhibits were lottery tickets or even record stakes relating to any lottery.

*f***Held:***g*

[1] The respondent in her caution statement did not deny knowledge of the exhibit P2. The prosecution had proved that P2 was in the possession of the respondent.

*h*

[2] There was no nexus between the respondent and the exhibits P4(a) and P4(b) which were found in the dustbin in the kitchen of a coffee shop. There was no evidence to show that the respondent was the owner of the coffee shop. The prosecution should have adduced evidence as to who was the owner or tenant of the coffee shop by producing the document of title or calling the landlord to testify if it was rented premises. This was not done. The prosecution therefore had not proved that P4(a) and P4(b) were found in the possession of the respondent.

*i*

[3] The expert (PW6) who was called to give evidence as to whether the exhibits amounted to lottery tickets had not even explained how an illegal 4-digit lottery was operated. The expert evidence was not adequate to enable the court to form an independent judgment that P2 was a lottery. The prosecution had not proved beyond reasonable doubt that P2 was a lottery ticket of any public lottery or was an account, memorandum, riddle or record of stakes or wagers in or relating to any public lottery.

*[Appeal dismissed.]*

**Cases referred to:**

*Any Chwee Keong v. Regina* [1955] MLJ 36 (cit) c  
*Chan Chan Seng v. PP* [1932] MLJ 107 (cit)  
*Chan Pean Leon v. PP* [1956] 22 MLJ 237 (cit)  
*Choo Yoke Chieng v. Public Prosecutor* [1992] 4 CLJ 1794 (refd)  
*Harilal Gordhan v. Emperor* AIR [1937] Bombay 385 (cit)  
*Khoo Hi Chiang v. Public Prosecutor* [1994] 2 CLJ 151 (refd)  
*Lee Boon Gan v. Regina* [1954] 20 MLJ 103 (cit) d  
*Ong Yap Chang v. PP* [1962] 28 MLJ 46 (cit)  
*PP v. Ha Jong Ru* [1980] 2 MLJ 256 (cit)  
*PP v. Kamde Raspani* [1988] 3 MLJ 289 (refd)  
*PP v. Kong Tshoi Kiew* [1996] 2 CLJ 1052 (cit)  
*PP v. Lee Ee Teong* [1953] 19 MLJ 244 (cit) e  
*Rex v. Soh Eng Chiang* [1937] MLJ 247 (cit)  
*Sim Ah Song & Anor v. Rex* [1951] 17 MLJ 150 (cit)  
*Wong Wiew Hock v. PP* [1997] 3 CLJ 255 (foll)

**Legislation referred to:**

Common Gaming Houses Act 1953, ss. 2, 4A(a), 11(3) f  
Police Lock-Up Rules 1953, r. 20

*For the appellant - Awang Armadajaya Awang Mahmud*

*For the respondent - Wong Sing Nang; M/s Wong, Orlando Chua & Co*

*Reported by Mariette Peters-Goh*

**JUDGMENT**

**Tee Ah Sing J:**

This is an appeal by the Public Prosecutor against the decision of the learned magistrate made on 15 March 1997 whereby the respondent who was charged under s. 4A(a) of the Common Gaming Houses Act 1953 (“the Act”) was acquitted and discharged.

**a** The charge was as follows:

That you, on the 27th day of August, 1992 at about 3.40 p.m., at King He Coffee Shop, Kpg. Nyabor Road, Sibui, in the State of Sarawak, did assist in the carrying on of a public lottery, to wit, illegal 4-Digit lottery, and that you have thereby committed an offence punishable under section 4A(a) of the Common Gaming Houses Act 1953.

**b**

In respect of ground 2(1) the learned Deputy Public Prosecutor (“the DPP”) submitted that from the evidence of PW1 and PW2 the prosecution has proved that the respondent was holding the tin. Further the cautioned statement (P9) was made voluntarily without any inducement, threat or promise clearly stated the contents of the tin. It was thus submitted that the respondent has knowledge as to the contents. The learned DPP also submitted that the ruling of the learned magistrate at p. 33 para. 4 as to the possibilities is not a criteria in deciding whether there are other interpretations of the evidence adduced. It is whether that an event is probable or otherwise. Further there was no challenge of the evidence adduced of the exclusive control of the kitchen by the respondent.

**d**

In respect of grounds 2(3) and 2(4) the learned DPP cited the case of *Khoo Hi Chiang v. Public Prosecutor* [1994] 1 MLJ 265 under held (2).

**e**

It is clear from this case that a trial court must deal with each and every ingredient of the offence charged and the failure to do so will cause a miscarriage of justice. Therefore the learned magistrate erred in law when he did not deal with the second ingredient of the charge as evidenced from his grounds of judgment at p. 35 last paragraph.

**f**

The learned counsel for the respondent in his written submission, *inter alia*, submitted as follows:

**g**

(1) The prosecution has failed to prove that the respondent was in possession of exhs. P2, P4(a) and P4(b) with written numbers of ten or more lottery tickets beyond reasonable doubt.

**h**

In *Choo Yoke Chieng v. Public Prosecutor* [1992] 4 CLJ at p. 1794, “the mere fact that the drugs were found in the room does not necessarily prove that the appellant had sole custody or control. It is not conclusive; it is neutral in nature.”

**i**

(2) The presumptions under s. 11 of the Act can only arise after possession has been proved. In support the following cases were cited:

(a) *Lee Boon Gan (f) v. Regina* [1954] 20 MLJ 103.

**a**

(b) *Chan Pean Leon v. PP* [1956] 22 MLJ 237.

(c) *PP v. Ha Jong Ru* [1980] 2 MLJ 256.

In our case, exhs. P2 and P4(a) and P4(b) are clearly not in the possession of the respondent. The respondent has no custody or control over the exhibits and no intention as owner in case of need to exercise that power to the exclusion of other persons. The prosecution has failed to prove the element of possession beyond reasonable doubt.

**b**

(3) If he was wrong on possession it was submitted that the court should consider whether exhs. P2, P4(a) and (b) were illegal 4-digit.

**c**

Lottery tickets and records of stakes relating to lottery tickets must be proved by evidence under s. 11(3) of the Act.

Under s. 2 of the Act “lottery ticket” is defined. So the prosecution must establish that (1) the number chosen; (2) the stake/amount of bet; (3) the date drawn; (4) the papers or documents or writing purporting to be a lottery ticket will entitle the holder on the happening of the event or contingency which decide the lottery receives money or money’s worth. In support the following cases were cited:

**d**

**e**

(a) *Chan Chan Seng v. PP* [1932] MLJ 107.

(b) *PP v. Lee Ee Teong* [1953] 19 MLJ 244.

Before the prosecution can invoke the presumption under s. 11 of the Act, the prosecution must prove the following –

**f**

(1) selling, offering for sale, giving or delivering or collecting lottery tickets;

(2) found in possession of ten or more –

(i) lottery tickets; or

**g**

(ii) counterfoils or duplicates of lottery tickets;

(3) found in possession of any account, memorandum, riddle or record of stakes or wagers in or relating to a lottery.

**h**

There has been no evidence from PW6 that the holder of P2, P4(a) and (b) are entitled to receive money or money worth. There is no evidence from PW6 that if the holder had successfully staked, how much he would be entitled to receive.

**i**

**a** (4) The ordinary rule with regard to experts is that they must state the facts upon which that opinions are based, for the court has to make the finding and not the experts. In support the following cases were cited:

(a) *Sim Ah Song & Anor. v. Rex* [1951] 17 MLJ 150.

**b** (b) *PP v. Lee Ee Teong* [1953] 19 MLJ 244.

(c) *Harilal Gordhan v. Emperor* AIR [1937] Bombay 385.

(d) *Any Chwee Keong v. Regina* [1955] MLJ 36.

**c** (e) *Rex v. Soh Eng Chiang* [1937] MLJ 247.

(f) *Ong Yap Chang v. PP* [1962] 28 MLJ 46.

(g) *PP v. Kong Tshoi Kiew* [1996] 2 CLJ 1052

**d** (h) *Wong Wiew Hock v. PP* [1997] 3 CLJ 255.

In our case from the testimony of PW6, it is clear that PW6's evidence as a gaming expert was wanting. He has not given any reasons or explanation for his opinion.

**e** (5) The respondent's cautioned statement was recorded at 2045 hours on 27 August 1992. It is in breach of Police (Lock-Up) Rules 1953 which states that "Prisoners shall be locked up for the night by 6.30pm and shall rise and be dressed by 6.30am".

**f** In *Public Prosecutor v. Kamde bin Raspani* [1988] 3 MLJ 289 Zakaria Yatim J rejected the caution statement for the reason, *inter alia*, that the interrogations were carried out after 6.30pm in violation of r. 20 of the Police Lock-Up Rules 1953. Therefore the caution statement is inadmissible.

The learned magistrate in his grounds of judgment at p. 33 of the appeal record said:

**g** In my view, there is a possibility that the accused tried to clean up the kitchen but suddenly the police party came and arrested her with the tin containing exhibit P2 and P3 were inside her hand. It must be noted that exhibit P4 (a-b) were found at the dustbin. How if I say that someone other than accused had walked into the kitchen and left the tin at the kitchen or threw away exhibit P4(a-b) into the dustbin. There is a lot of possibility may occur. In the absence of evidence saying that the kitchen could not be accessible to anyone other than the accused, it cannot be said that the accused had exclusive control of the exhibit ie, exhibit P2, P3 and P4 (a-b) which are the incriminating exhibit in this case.

**i**

There was no evidence adduced that someone left the tin at the kitchen or threw away exh. P4(a) and (b) into the dustbin. There was also no evidence adduced that at the material time there were other people in the kitchen when the respondent was arrested. According to PW2 the respondent was the only person in the kitchen. As such I am of the view that the learned magistrate had erred when he used conjecture and surmise to justify his conclusion as aforesaid.

*a**b*

The issue before the learned magistrate was whether the exhs. P1, P2, P3, P4(a) and (b) were found in the possession of the respondent.

Cpl. Ghazali (PW2) has testified that on 27 August 1992 at 3.40pm he went with a police party led by Chief Inspector Salim to King He Coffee Shop at Jalan Kpg. Nyabor Sibui. On arrival at the coffee shop, the police party split into two groups. He went to the kitchen section with Cpl. Jamil. At that time Cpl. Jamil and he saw one Chinese woman was holding one tin. They detained her and saw what was inside the tin. She was holding like she was trying to throw away. While they detained the said woman the tin was still inside her hand. The tin was closed at that time. Cpl. Jamil and he opened the said tin and found one small booklet written with number and piece of carbon paper. He tried to look for other item at the kitchen section. He found two pieces of paper in the dustbin and he found one pen at the kitchen section on a table. PW2 also stated that the owner's name is Chiong Phing Lung whom he identified as the accused. On that day besides the accused person in the kitchen section there was nobody there.

*c**d**e*

From the evidence of PW2 it is clear that a tin (P1) was recovered from the hand of the respondent. From inside the tin (P1), P2 and P3 were recovered. PW2 has also testified that the respondent tried to throw the thing she was holding. When questioned by the court PW2 stated that the accused tried to throw the thing inside the hand away but she did not try to escape. I am of the view that the conduct of the respondent shows that she has knowledge of the contents in the tin.

*f**g*

When the cautioned statement (P9) was tendered through the recording officer ASP Tan Boon Sing (PW3) the respondent did not object on the ground that it was not made voluntarily. The evidence of PW3 and the interpreter Cpl. William Lau (PW4) show that the cautioned statement was made voluntarily.

*h*

In the cautioned statement (P9) the respondent stated that:

Pada masa itu saya memegang satu tin. Polis kemudian telah merampas tin berkenaan dan polis telah membuka tin berkenaan dan didalamnya mengandung sebuah buku kecil dan satu kertas karbon. Didalam buku berkenaan bertulis dengan nombor nombor 4 digit.

*i*

- a* In the cautioned statement the respondent did not deny that she did not know the contents in the tin. The contents in the cautioned statement shows that the respondent has knowledge of the contents in the tin. So the prosecution has proved that P1, P2 and P3 were in the possession of the respondent.
- b* Inspector Salim Dahlan (PW1) has stated in evidence that on 27 August 1992 at 3.40pm he was at King He Coffee Shop, Jalan Kpg. Nyabor Sibul together with a police party. On arrival at the place they introduced themselves as police officer to the owner of the said place. PW1 identified the respondent as the owner. However, PW1 has not told the court how he knew that the respondent was the owner of the said place. Further, PW1 did not adduce any
- c* evidence to support his assertion that the respondent was the owner of the shop. The prosecution should have adduced evidence as to who is the owner or tenant of the King He Coffee Shop by producing the document of title or calling the landlord to testify if it was a rented premises. So there is no evidence that the respondent is the owner, occupant or tenant of the said
- d* premises.
- As such there is no nexus between the respondent and exh. P4(a) and (b) that were found in the dustbin in the kitchen. So the prosecution has not proved that P4(a) and (b) were found in the possession of the respondent.
- e* The next issue for the court to decide is whether exh. P2 are copies of lottery tickets or record of stakes relating to any lottery.
- Chief Inspector Tieu Leong Seng (PW6) has testified in his examination-in-chief (at p. 25 of the appeal record) as follows:
- f* After examination for exhibit P2, is a record of stake pertaining to illegal 4D lottery. It was written with 162 illegal 4D lottery tickets with total stake of RM712.50. There is no date written in this booklet. But RM1.20, RM2.40, RM12.50, these bet are found in illegal 4D and we can also found code like X. It represents 50c. Then we can also found one circle surrounding one
- g* number. This is a code for permutation bet and it is one of the code used in illegal 4D. This booklet is written in duplicate. The first copy will be given to the operator and the 2nd copy will be kept by the agent.
- For P3, on the carbon copy, we can see tracing mark on figure. ... During my exam. when the said was conducted i.e. 27/8/92, there was a draw conducted
- h* by Magnum Corporation Sdn. Bhd.
- In my search, illegal 4D operators are carried out operation that is on draw conducted by Magnum. Unless it is stated specially on Toto, the rest will be based on Magnum. Here, I don't see any word of Toto therefore I presumed it based on Magnum.
- i*

Exhibit P2 reads as follows:

*a*

**No. 20**

|           |           |         |         |
|-----------|-----------|---------|---------|
| 283350    | 11356     | 91002   | 98415   |
| 338210    | 13506     | 901010  | 16931   |
| 17172     | 823313(1) | 63326   | 45891   |
| 19192     | 33286     | 90106X  | 22621   |
| 50502     | 510013(1) | 43996   | 38651   |
| 18582X    | 138813(1) | 4517316 | 20203   |
| 78602X    | 88316     | 41133   | 80331.2 |
| 883330(3) | 26273     | 31143   | 10331.2 |
| 338825    | 82003     | 64933   | 64393   |

*b*

*c*

**No. 21**

|       |          |           |        |
|-------|----------|-----------|--------|
| 21103 | 54833    | 31183X(1) | 67192  |
| 99123 | 34853    | 81132     | 56502  |
| 21993 | 38453    | 19522     | 75666  |
| 12823 | 16823    | 19532     | 60623  |
| 28213 | 16643    | 19542     | 62466  |
| 82123 | 82163    | 50792     | 18463  |
| 28643 | 28163    | 31635     | 18473  |
| 82643 | 00833    | 57892     | 50983  |
| 58433 | 79882(X) | 226012X   | 15953X |

*d*

*e*

**No. 22**

|         |           |               |
|---------|-----------|---------------|
| 274412X | 347513    | (8)(8)277(10) |
| 708012X | 353710(8) | (8)27750(10)  |
| 440912X | 335710    | 877250        |
| 99222.4 | 373510    | 506010        |
| 20122.4 | 589010    |               |
| 21022.4 | 390810    |               |
| 28292.4 | 34755     |               |
| 76941.2 | 19695     |               |
| 85371.2 | 20685     |               |

*f*

*g*

PW6 has not explained how he came to the conclusion that P2 was written with 162 illegal lottery tickets with total stake of RM712.50. For example in P2 No. 20 in the first line there are written the figures 283350, 11356, 91002, 98415. PW6 has not explained in the figures “283350”, “11356”, “91002” and “98415” mean. PW6 has not explained in the figure “283350” what is the number staked and for what amount.

*h*

PW6 has also testified that in P2 there are RM1.20, RM2.40 and RM12.50 bets. These are found in illegal 4D. However PW6 has not explained how these bets of RM1.20, RM2.40 and RM12.50 are based on. He has also not pointed to the court what are the figures in P2 that have RM1.20, RM2.40 and RM12.50 bets and what were the numbers staked.

*i*

*a* PW6 has also said “we can also found one circle surrounding one number. This is a code for pemutation bet.” No reason were given for this opinion. He has not explained what is meant by a code for pemutation bet. He has also not explained what were the numbers staked in respect of the pemutation bets.

*b* PW6 did not explain how an illegal 4-digit lottery is operated.

I am of the view that it is quite impossible to say by looking at the figures in P2 how they could be said to be a statement of 4 digit numbers chosen with the amount of stakes for each number.

*c* I am of the view that the evidence of the expert (PW6) was wanting. The expert evidence was not adequate to enable the court to form an independent judgment that P2 was a lottery. (See *Wong Wiew Hock v. Public Prosecutor* [1997] 3 CLJ 255). Therefore the prosecution has not proved beyond reasonable doubt that P2 is a lottery ticket of any public lottery or is an account, memorandum, riddle or record of stakes or wagers in or relating to any public lottery.

In view of the foregoing, I dismiss the appeal.

*e*

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*f*

*g*

*h*

*i*